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In the

Supreme Court of the United States

OCTOBER TERM, 1976

ILLINOIS BRICK COMPANY, et al.,
Petitioners,

vs

STATE OF ILLINOIS, et al.,
Respondents.

BRIEF FOR RESPONDENTS

WILLIAM J. SCOTT
Attorney General for the
State of Illinois

160 North LaSalle Street
Chicago, Illinois 60601

LEE A. FREEMAN, JR.
Special Assistant Attorney
General for the State of
Illinois

FREEMAN, ROTHE, FREEMAN
& SALZMAN
One IBM Plaza—Suite 3200
Chicago, Illinois 60611

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BRIEF FOR RESPONDENTS

QUESTION PRESENTED

The question raised in this case is whether the State of Illinois and its public agencies have standing to sue, as a matter of law, for damages that can be shown to have resulted from a conspiracy by defendants to raise and maintain the prices of concrete block, even if plaintiffs have not purchased concrete block directly from the defendants.

COUNTER-STATEMENT OF THE CASE

In April 1973 the United States indicted and filed a companion civil action against eleven manufacturers of concrete block used in building construction, charging

conspiratorial price fixing in the sale of such concrete block in the Greater Chicago Area, in violation of Section 1 of the Sherman Act (15 U.S.C. §1). Pleas of *nolo contendere* were accepted in the criminal case and a consent decree entered in the civil action.

At the same time private treble damage actions were filed on behalf of (a) masonry contractors, (b) general contractors, (c) private builders, and (d) the State of Illinois and its political subdivisions. All of these actions, except the State of Illinois action, were settled by the defendants with the payment of agreed upon sums of money.

The complaint filed by the State of Illinois and various local governmental entities ("plaintiffs") alleges that petitioners ("defendants") conspired "to raise, fix and stabilize the price of concrete block in the Greater Chicago Area" (Joint App. 11), that plaintiffs indirectly purchased substantial quantities of concrete block from defendants and that:

> By reason of defendants' illegal conduct, such plaintiffs were compelled to pay and have paid substantially higher prices for such concrete blocks than they would have paid had defendants' combination and conspiracy not existed or occurred. (Joint App. 12).

The Seventh Circuit summarized the factual allegations by the State of Illinois as follows:

> Plaintiffs assert that the defendants sold large quantities of concrete block to masonry and general contractors for incorporation in public buildings and structures. Most of the building project contracts were awarded pursuant to competitive bidding based on plans and specifications setting forth the amount

> and type of concrete block required. The bids submitted included the cost of the concrete block purchased from the manufacturer or masonry contractor. Thus the plaintiffs were not the first purchasers of the concrete block although they alleged that the cost of the product was passed on to them. *State of Illinois* v. *Ampress Brick Co.*, 536 F.2d 1163, 1164 (7th Cir. 1976).

Defendants moved for summary judgment on the ground that the State of Illinois and its public agencies were indirect purchasers of concrete block and, as such, lacked standing to recover damages for the overcharges that they were forced to pay.[1] This motion was unsupported by any evidentiary material with regard to the specific allegation that the State of Illinois and its public agencies had been forced to pay excessive prices as a result of defendants' illegal conduct. Thus, for purposes of their motion, defendants admitted that the State of Illinois could prove that the price-fixing conspiracy caused financial damages to all public agencies that purchased concrete block.

The District Court characterized the State of Illinois and its public agencies as "ultimate consumers" and concluded that "their injuries are too remote and consequential to provide *legal standing* to sue against the alleged antitrust violator." 67 F.R.D. at 468. (Emphasis added). On appeal, the Seventh Circuit reversed, holding that "plaintiffs here have alleged an injury in fact and are within the target area of the Sherman and Clayton Acts." 536 F.2d at 1167.

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[1] The defendants referred the District Court to interrogatory answers by the State of Illinois, which did nothing more than illustrate the conceded fact that the plaintiffs were indirect purchasers.

Despite the lack of any evidentiary support, defendants have presented, at length, their version of the facts with respect to the purchase and resale of concrete block by contractors, contending that "complex and independent pricing decisions were made," that the price of concrete block sold to the State of Illinois and its public agencies has no relation to the prices illegally fixed by defendants, and that proof of damages would involve insurmountable difficulties (P.Br. 5, 14). Quite to the contrary, as more fully discussed in argument, there is a direct and readily proved relationship between the overcharges on concrete block and the damages suffered by plaintiffs. The State of Illinois intends to present evidence regarding the methods that contractors use to compute their bids for public construction projects, which will establish that contractors charge plaintiffs the full cost of concrete block, plus a variable markup for overhead and profit. A jury would not require any complex economic analysis to conclude that the full amounts of the illegal overcharges were passed on to the State of Illinois and its public agencies in connection with every building they constructed during the conspiratorial period.

SUMMARY OF ARGUMENT

The complaint filed by the State of Illinois in this case charges a price-fixing conspiracy among the manufacturers of concrete block, which conspiracy operated to raise illegally the price of concrete block purchased for construction of public buildings. The concrete block was purchased through contractors who added a percentage markup to the excessive price set by the manufacturers.

The federal courts have long recognized the standing of public agencies to sue manufacturers under Section 4 of the Clayton Act for antitrust violations that inflate

the prices of materials sold through wholesalers or contractors. It has been repeatedly held that standing does not turn on the relationship of the claimant to the price-fixer, or whether there is privity of contract between plaintiff and defendant. In numerous reported cases, states and their political subdivisions have recovered substantial damages for price-fixing conspiracies in the construction field that involved products such as plumbing fixtures, builders hardware, gypsum wallboard, structural steel, brass mill tubing, steel conduit pipe, and liquid asphalt. These cases involved circumstances identical to the present case.

This Court held in ***Hanover Shoe, Inc.*** v. ***United Shoe Machinery Corp.***, 392 U.S. 481 (1968), that defendant could not attempt to show that plaintiff passed on the inflated cost it incurred to lease machinery by raising the prices of shoes it manufactured. That decision was premised upon an unwavering commitment to effective private antitrust enforcement. The rejection of the "passing-on defense" in the circumstances of *Hanover Shoe* did not disturb—either expressly or by implication—the well-settled law that indirect purchasers may sue manufacturers for damages caused by illegally fixed prices on products sold through contractors and other middlemen.

The experience in a broad range of antitrust cases shows that there is a direct and readily proved relationship between illegal overcharges by defendants and the price ultimately paid by the State of Illinois and its public agencies. The masonry and general contractors are nothing more than conduits between defendants and plaintiffs. The contractor incorporates his material cost for concrete block, then adds a percentage markup for

overhead and profit. Competition and other factors only affect the amount of markup that the contractor puts in his material cost.

The State of Illinois and its public agencies were the actual victims of defendants' price-fixing conspiracy. Concern about possible difficulties of proof cannot justify absolute denial of their clear statutory remedy. The allegations in this case raise factual issues that should be resolved by the jury.

ARGUMENT

I. THE WEIGHT OF AUTHORITY SUPPORTS THE RIGHT OF INDIRECT PURCHASERS TO RECOVER PROVABLE DAMAGES.

A. The plain words of Section 4 of the Clayton Act confer standing upon the State of Illinois.

Section 4 of the Clayton Act, 15 U.S.C. §15, provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

The statute makes no distinction between damages suffered by direct or indirect purchasers.

It is well settled that standing to sue under Section 4 does not turn on the relationship of the claimant to the price-fixer. As stressed by this Court in *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948):

> The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.

This Court has held, in the price discrimination context, that a plaintiff may recover damages "regardless of the

'level' in the chain of distribution on which the injury occurs. . . . If there is sufficient evidence in the record to support an inference of causation, the ultimate conclusion as to what the evidence proves is for the jury." *Perkins* v. *Standard Oil Co.*, 395 U.S. 642, 648 (1969).

The courts of appeals in almost every circuit have rejected the notion that there must be privity between plaintiff and defendant in antitrust cases.[2] *South Carolina Council of Milk Producers, Inc.* v. *Newton*, 360 F.2d 414, 417-419 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966), succinctly expresses this doctrine:

> Section 4 does not in its terms limit relief to persons in a direct contractual or competitive status with the persons whose conduct allegedly violates the proscriptions of the Sherman Act. . . . [T]he cause of action is not dependent upon a relationship, contractual or otherwise, between the claimant and the offender, so long as the injury is a proximate result of the misdoing.

Attempts to impose additional restrictions on the standing of plaintiffs to sue under the antitrust statutes have consistently been rejected by the Supreme Court as repugnant to the unequivocal language of the statute and to the expressed belief of Congress "that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws." *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 381 U.S.

[2] *E.g., Karseal Corp.* v. *Richfield Oil Corp.*, 221 F.2d 358 (9th Cir. 1955); *Dailey* v. *Quality School Plan, Inc.*, 380 F.2d 484 (5th Cir. 1967); *Clark Oil Co.* v. *Phillips Petroleum Co.*, 148 F.2d 580 (8th Cir.), *cert. denied*, 326 U.S. 734 (1945); *Malamud* v. *Sinclair Oil Co.*, 521 F.2d 1142, 1151-1152 (6th Cir. 1975).

311, 318 (1965). Thus in *Radovich* v. *National Football League*, 352 U.S. 445, 454 (1957), the Court said:

> In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws.

In the language of *Mandeville Island Farms*, the State of Illinois and its public agencies were the intended and actual "victims" of defendants' conspiracy to inflate the prices of concrete block.[3] The Clayton Act clearly confers standing upon such "persons" to recover the overcharges paid as a result of the higher prices illegally established by defendants.

B. Pre-Hanover Shoe decisions permitted recovery of damages by indirect purchasers in factual settings identical to this case.

Prior to the decision in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), the federal courts consistently ruled that indirect purchasers had standing to sue and could recover damages for illegal

[3] The Seventh Circuit concluded that the State of Illinois was within the "zone of interest" to be protected by statute. *State of Illinois* v. *Ampress Brick Co.*, 536 F.2d 1163, 1164-1165 (1976). An impartial commentator has pointedly noted in "*Mangano* and Ultimate-Consumer Standing: The Misuse of the *Hanover* Doctrine," 72 *Colum. L. Rev.* 394, 413 (1972):

> [I]t is a curious result to suggest that a large manufacturer, who normally produces his goods with the intention and expectation that they will be distributed throughout several market areas, cannot foresee that his illegal price-fixing conduct will affect parties remote from his immediate business contacts.

overcharges on products sold through contractors and middlemen. These principles developed at the same time that courts were holding that defendants could not assert the pass-on defense to escape liability to direct purchasers.[4]

A leading decision, *Armco Steel Corp.* v. *North Dakota*, 376 F.2d 206 (8th Cir. 1967), affirmed damages awarded by the jury to North Dakota for the same kind of indirect purchases involved in this case. North Dakota had brought suit against Armco for conspiring with three local fabricators to fix the prices of corrugated metal culverts. The culverts were sold to contractors who installed them in state highway construction projects. The jury found that North Dakota had sustained actual damages of $258,355, as a result of the price-fixing conspiracy. Because North Dakota was an indirect purchaser, Armco "argued that the use of the conspiratorial list prices in quotation to contractors for use as an element in bidding on highway-construction projects could not occasion any injury to the State, but only to the contractors." The Eighth Circuit unanimously rejected this contention as unrealistic, stressing that the evidence showed that North

[4] For instance, Judge Boldt upheld the right of indirect purchasers to sue in *State of Washington* v. *General Electric Co.*, 246 F.Supp 960, 962 (W.D. Wash. 1965). Just a year earlier, Judge Boldt rejected the pass-on defense urged to defeat damage claims for price-fixing in *Public Utility District No. 1 of Chelan County, Washington* v. *General Electric Co.*, 230 F.Supp. 744 (W.D. Wash. 1964). Other decisions, even though rejecting the pass-on defense, explicitly recognized that indirect purchasers have a cause of action for antitrust violations. *E.g., Ohio Valley Electric Corp.* v. *General Electric Co.*, 244 F. Supp. 914, 951 (S.D.N.Y. 1965) (Feinberg, J.).

Dakota, the ultimate purchaser, had in fact suffered damages from the overcharges. 376 F.2d at 210.

Armco Steel is part of an unbroken line of cases upholding the right of indirect purchasers, especially public agencies, to recover damages for antitrust violations. Thus, *Missouri* v. *Stupp Brothers Bridge & Iron Co.*, 248 F.Supp. 169, 170 (W.D. Mo. 1965), held that Missouri could seek damages for indirect purchases of structural steel. The structural steel "affected by [the] conspiracy was purchased by prime contractors and subcontractors for use in the construction of new steel bridges which were in each instance themselves part of and integrated into a larger highway project." Relying upon the statutory language and its underlying policy, the court concluded in *Stupp Brothers* that it could "not read into Section 4 of the Clayton Act a requirement of privity" and that indirect purchasers should be entitled to sue for "whatever injury they may be able to prove." 248 F.Supp. at 174, 175.

Only a year before *Hanover Shoe,* Chief Judge Pence held in *State of Washington* v. *American Pipe & Construction Co.*, 274 F.Supp. 961, 962 (W.D. Wash. 1967), that Washington had standing to sue for injuries sustained "as a result of price fixing by the manufacturers of concrete and steel conduit pipe." Just as in this case, the State of Washington purchased the pipe from a general contractor as part of a total project, rather than from the manufacturer:

> General contractors in bidding for the right to perform a project, of course include a pipe quotation in the bid, and, if the successful bidder, independently purchased pipe and "resold" it to plaintiffs as part of

> the completed job. . . . Normally the contractors would but incorporate defendant's quotations in their bids, and purchase the pipe only when awarded a contract. 274 F. Supp. at 963.

On these facts, *American Pipe* rejected the argument that the conspiracy spent itself on the contractors so that any injury to plaintiffs was "too inconsequential and remote to support a cause of action." 274 F.Supp. at 965.

C. Hanover Shoe did not change existing law that allowed recovery of antitrust damages by indirect purchasers.

In *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), United claimed that Hanover suffered no legally cognizable injury because the overcharge that Hanover paid for United's machinery was passed on to Hanover's customers for shoes. The Supreme Court rejected this claimed defense for two interrelated reasons: (a) recognition of the defense would substantially reduce the effectiveness of private antitrust enforcement because the "ultimate customers . . . the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit" and might not assert their claims; and (b) the consequent inquiry into the underlying economic considerations necessary to establish the pass-on defense would so unduly complicate the litigation process as to undermine the efficacy of the private enforcement mechanism. 392 U.S. at 494.

The holding in *Hanover Shoe* simply concerned the proper scope of the "passing-on defense," not the question whether indirect purchasers may bring suit to prove that they suffered injury by having to pay inflated prices.

It did not disturb the well-settled law, as set forth in contemporaneous opinions by lower federal courts, that indirect purchasers could sue for illegal overcharges on products that defendants sold through contractors and other middlemen. As stressed in *Boshes* v. *General Motors Corp.*, 59 F.R.D. 589, 595 (N.D. Ill. 1973), the Supreme Court:

> nowhere specifically states that Hanover Shoe had standing *because* it was in "privity" with United Shoe or that privity is a requirement of standing in private antitrust cases. In fact, this court has searched in vain for any discussion of the question of standing in the *Hanover Shoe* opinion. If the Court there had intended to establish such a rule, it clearly would have said something about the recent and substantial body of authority which had reached a contrary conclusion and permitted suits under §4 of the Clayton Act by those not in "privity" with the alleged antitrust violator. [citations omitted].

II. THE RATIONALE OF HANOVER SHOE SUPPORTS THE RIGHT OF INDIRECT PURCHASERS TO RECOVER PROVABLE DAMAGES.

Recent decisions in the Second and Ninth Circuits, as well as the courts below, have unequivocally rejected defendants' argument that *Hanover Shoe* should be construed to restrict the standing of indirect purchasers. (P.Br. 8-13). As put by the Seventh Circuit:

> No subsequent decision of [the Supreme] Court has confined the treble damage remedy to direct consumers. The sweeping language of the statute and the policy encouraging private enforcement of the antitrust laws persuade us that if plaintiffs can prove a violation which resulted in an injury to them, they ought to recover. 536 F.2d at 1165.

This result is compelled by the plain meaning of *Hanover Shoe,* the policy reasons for its rejection of the pass-on defense, and the economic realities with regard to who actually suffered damages.

A. Hanover Shoe cannot be taken to have somehow deprived indirect purchasers of their right to recover damages for price-fixing of products that are sold through contractors and other middlemen.

Federal courts since *Hanover Shoe* have had no difficulty with treble damage actions brought by governmental plaintiffs in circumstances identical to this case. The well-reasoned decision *In re Master Key Antitrust Litigation,* 1973-2 Trade Cas. ¶74,680 (D.Conn. 1973), strongly reaffirmed the standing of the State of Illinois to recover overcharges on hardware indirectly purchased through contractors for public buildings:

> [D]efendants' invocation of *Hanover,* which *rejected* a proposed pass-on defense in order to ensure that those who violated the antitrust laws did not escape liability through a multiplication of legal complexity, strikes a discordant note. . . . The attempt to transform a rejection of a defense because it unduly hampers antitrust enforcement into a reason for a complete refusal to entertain the claims of a certain class of plaintiffs seems an ingenious attempt to turn the decision and its underlying rationale on its head.
>
> • • •
>
> Assuming, as must be done on summary judgment, that these defendants have violated the antitrust laws, they should not be permitted to escape the penalties Congress has mandated. To do so would fly in the face of the Supreme Court's manifest concern for "the effectiveness of the private action as a vital means of enforcing the antitrust policy of the United States." *Id.,* at 94,978-94,979.

Shortly thereafter, the Ninth Circuit in *In re Western Liquid Asphalt Cases,* 487 F.2d 191 (9th Cir. 1973), *cert. denied sub nom., Standard Oil Co.* v. *Alaska,* 415 U.S. 919 (1974), upheld the right of several states to sue for illegal overcharges on asphalt that they indirectly purchased through contractors for highway construction, pointing out:

> Our case, then, involves "passing on," not as a defense, but as a theory of recovery in the nature of an offense. Here we are directly confronted with the policy favoring the allowance of recovery to appellants who can prove both the occurrence of an antitrust violation and that they each thereby incurred substantial damage. . . .
>
> In our case, this policy favors permitting appellants to demonstrate injury by reason of any passed-on overcharge. 487 F.2d at 197-198.

The Second Circuit has held rejection of the "passing-on defense" in *Hanover Shoe* to be perfectly consistent with recovery of damages by indirect purchasers. *In re Master Key Antitrust Litigation,* 528 F.2d 5, 12 n.11 (2d Cir. 1975); *State of West Virginia* v. *Chas. Pfizer & Co. (Tetracycline),* 324 F.Supp. 710 (S.D.N.Y. 1970), *aff'd,* 440 F.2d 1079, 1087 (2d Cir.), *cert. denied,* 404 U.S. 871 (1971). The settlement approved by the trial court in *Tetracycline* provided for refunds of overcharges to all purchasers in the chain of distribution. Certain retailers and wholesalers, however, opposed allocation of any money to ultimate consumers on the ground that *Hanover Shoe* deprived indirect purchasers of legal stand-

ing to recover their damages. The District Court rejected this argument, and distinguished *Hanover Shoe* on its facts:

> United charged Hanover more for shoe machinery than would have been charged except for the antitrust violation. The machinery was then used in making shoes from Hanover designs, using all the necessary materials (leather, thread, cloth, etc.) and applying the labor and skills of the Hanover organization. The use of the machinery was by Hanover, which was in the position of a consumer or end user of the machinery. The machinery was not resold, as were the antibiotics in suit. 314 F.Supp. at 746.

The District Court concluded that the ultimate consumer suffered the actual damage since the middlemen resold the antibiotics in the form obtained from the manufacturers, adding their markup to the artificially inflated cost. 314 F.Supp. at 745.

The Second Circuit affirmed the settlement approval and reconciled recovery of overcharges by indirect purchasers with *Hanover Shoe* in the following language:

> First, the passing-on doctrine is not here being used as a defense to permit the defendants to escape liability, but rather as an attempt to award damages, insofar as is possible, to those who ultimately paid higher prices as a result of the collusive pricing, and to avoid giving a windfall gain to those who rather clearly were not injured. Secondly, to permit the use of the doctrine in the present circumstances will not act to limit or frustrate private treble-damage claims, but will, if anything, do the opposite. 440 F.2d at 1088.

The recent decision in *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 266 (1972), rebuts any suggestion that

Hanover Shoe was meant to bar recovery by indirect purchasers. *Hawaii* v. *Standard Oil Co.* held that public agencies and ultimate consumers have a right under the Clayton Act to recover damages for injury to their "commercial interests or enterprises." 405 U.S. at 264. Moreover, this Court recognized that states may sue as class representatives to recover financial damages suffered by ultimate "consumers" due to antitrust violations. While it disallowed a *parens patriae* action for alleged harm to the general economy, this Court noted that a state could bring a Rule 23 "class action on behalf of some or all of its consumer citizens" and commended the use of class actions to "enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture." 405 U.S. at 266.

The Court of Appeals for the District of Columbia has construed *Hawaii* v. *Standard Oil Co.* as authority in support of class actions against drug manufacturers by states representing individuals who purchased antibiotic drugs indirectly from retail drug stores. *State of Illinois* v. *Bristol-Myers Co.*, 470 F.2d 1278, n.4 (D.C. Cir. 1972). *See also Boshes* v. *General Motors Corp.*, 59 F.R.D. at 589.

B. The Third Circuit's decision in Mangano distorts the holding and rationale of Hanover Shoe.

Defendants rely upon a pretrial ruling in *Mangano* v. *American Radiator & Standard Sanitary Corp.*, 438 F.2d 1187 (3d Cir. 1971), *aff'g*, 50 F.R.D. 13 (E.D.Pa. 1970) (*Plumbing Fixtures Cases*), for their argument that the State of Illinois and its public entities are too remote to sue for damages under the antitrust laws

(P.Br. 12-14).[5] But the *Mangano* decision has been recognized as exceedingly poor authority for a doctrine that would deny redress to indirect purchasers who can prove they were damaged. The first ground for the *Mangano* decision was the refusal of plaintiffs to answer interrogatories. Curiously, the issue whether the *Hanover Shoe* doctrine should affect the rights of indirect purchasers was conceded by the *Mangano* plaintiffs. 50 F.R.D. at 29. In its short opinion, the Third Circuit carefully limited its holding to the "circumstances" created by the refusal of plaintiffs to respond to discovery requests. 438 F.2d at 1188.

The inconsistent positions taken by the Third Circuit itself in the *Plumbing Fixtures Cases* illustrates the possible evil consequences of the *Mangano* ruling. Defendants were able to cut off their exposure to indirect purchasers and, at the same time, avoid substantial liability by making cheap settlements with their initial purchasers. In *Ace Heating & Plumbing Co.* v. *Crane Co.*, 453 F.2d 30 (3d Cir. 1971), the Third Circuit affirmed the trial court's approval of the settlement in the *Plumbing Fixtures Cases* over the objection that not enough money

[5] Petitioners also harken back to the decision in *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918), for the argument that the federal courts should not undertake to determine who, in fact, suffered damage from antitrust price-fixing. (P.Br. 22). There are two reasons why *Darnell-Taenzer* is not relevant. First, *Darnell-Taenzer* was decided when privity was still required under tort law; it did not enshrine privity as a prerequisite to antitrust suits. Second, *Darnell-Taenzer* was a suit brought under the Interstate Commerce Act (49 U.S.C. §1), not the antitrust laws. It thus involved the problem of administrative agency regulation, a consideration not present in this case.

had been allocated to contractors. Despite the prior decision in *Mangano* that indirect purchasers had no standing to recover damages, the Third Circuit saw no reason for the initial purchasers to recover either, stating:

> [T]he claims of this class [contractors] were minimized by the probability that overcharges made upon them were passed on to their customers. 453 F.2d at 34.

As summarized in *In re Master Key Antitrust Litigation*, 1973-2 Trade Cas. ¶74,680 at p. 94,980:

> Thus, the defendants in the plumbing fixtures cases managed neatly to have it both ways. They escaped any liability to the ultimate purchasers, and then got off with reduced damages on the theory that the parties who had suffered legally cognizable injury had passed on their losses to those same ultimate purchasers. No result could more effectively undercut the important congressional policy embodied in the Clayton Act, which includes awards of treble damages as its primary weapon of enforcement. Dismissal of the governmental plaintiffs at this stage of the present litigation would provide the stage for the same acrobatics so dextrously performed by the *Mangano* defendants.

Having already made settlements with contractors and private builders, defendants in this litigation seek to escape meaningful liability in the same fashion as the defendants in the *Plumbing Fixtures Cases*.

III. THE STATE OF ILLINOIS CAN PROVE, IN FACT, THAT ITS PUBLIC AGENCIES WERE THE PERSONS ACTUALLY DAMAGED BY PAYING THE INCREASED PRICES THAT RESULTED FROM DEFENDANTS' CONSPIRACY.

Defendants argue that the State of Illinois should not be permitted to sue for the damages it allegedly

incurred because "proof of injury and monetary damage" would be extremely difficult. (P.Br. 15, 20). Besides its complete lack of factual support, this argument rests upon faulty economic theory, ignores the procedures developed by federal courts for trial of complex antitrust cases, and underestimates the common sense of juries. The State of Illinois and public agencies purchased enormous amounts of concrete block for school, hospital and other construction projects; they were the persons that most clearly suffered financial loss as a result of defendants' antitrust violations.

A. There is a direct and readily proved relationship between defendants' prices for concrete block and the price paid by the public agencies for this material used in building construction.

General contractors follow a standard procedure to calculate bids to public agencies.[6] Prior to competitive bidding, the contractor ascertains the cost of concrete block required, as well as all other necessary materials, and gets quotations on jobs to be subcontracted, which may include masonry work. Based on the lowest quotation he receives, the contractor includes the full cost of the concrete block, or masonry subcontract, in his bid as a known cost. The contractor totals his material, labor, and subcontract costs, then adds a variable percentage for overhead and profit. Consequently, if the defendants were to charge a lower price for the concrete block, the masonry contractor's quotation to the public agency would be reduced by the same amount

[6] The masonry contractor operates in the same manner as the general contractor, just adding one step to the chain of distribution.

(as well as the percentage markup applied to that amount). The masonry and general contractors are nothing more than conduits between defendants and plaintiffs. The contractors absorb none of the illegal overcharges, but recover it completely (and more) from the State of Illinois and its public agencies.[7]

The cost of concrete block is "known" in advance of bidding; any increase in this cost has a direct impact on the State of Illinois. The other elements considered by a contractor in computing a bid include his work force, overhead, risk and competition. While the final bid will depend on the contractor's estimate of such factors, the basic fact remains that the contractor's bid directly includes the total cost to him of the concrete block. The only independent pricing decision made by the contractor is how much markup should be put on the cost for concrete block. Competition among contractors does not affect the price of concrete block; it is irrelevant, therefore, to the amount that plaintiffs were damaged by the illegally inflated price of concrete block. The price paid by the State of Illinois for concrete block is excessive no matter what profit the contractor makes on a particular project since each contractor's bid carries forward the higher price he was forced to pay for the concrete block. If the cost of materials is inflated, this inflation directly registers in the prices charged by the masonry and general contractor regardless of other factors considered in setting their bids..

[7] Some contractors calculate labor costs by reference, in part, to their known material cost. In such a situation, an overcharge on concrete block would aggrevate the damages suffered by the governmental plaintiffs.

B. The economic basis for rejection of the "pass-on defense" in Hanover Shoe has no application to recovery for purchases of price-fixed concrete block by plaintiffs.

The difference between a retail purchaser of shoes and the public agencies who paid contractors for concrete block precludes reliance on *Hanover Shoe* as authority that the contractors who worked for such public agencies are the only parties having a claim for damages against defendants.

Hanover Shoe involved a situation where Hanover leased machines to produce shoes; the subject of the suit was a capital expenditure by the shoe manufacturer. When Hanover priced its shoes, it had to consider competition from other domestic and foreign shoe manufacturers, who operated with different overhead and different labor costs. No matter how accurate Hanover's cost accounting, it could not set its prices for shoes strictly as a function of its costs for leasing the machines that produced the shoes, or any other capital item. The prices for shoes depended on competitive conditions of supply and demand. Consequently, there was no direct correlation between the cost of the machines and Hanover's price for shoes—much less the retail price at which ultimate consumers purchased the shoes. In such circumstances, the Supreme Court properly refused to let United Shoe muddy the record with esoteric inquiry into Hanover's profit margins and hypothetical pricing changes.[8]

[8] The Court noted in *Hanover Shoe* that assertion of the "passing-on defense" would involve "nearly insuperable difficulty of proof" that the cost of leasing the machinery affected plaintiff's prices and margin of profit. 392 U.S. 493.

In contrast, concrete block is a material that a contractor purchases for resale to plaintiffs. How much markup the contractor puts on the cost of materials does not affect the fact that the State of Illinois and its public agencies ultimately pay the higher prices set by defendants. Defendants completely misconceive the issue by arguing that "there is no evidence that the masonry contractors raised their prices in the exact amount of the alleged overcharge. . . ." (P.Br. 20). Such proof is not necessary, since the pass-on issue in this litigation does not concern profit margins. Damages result from the fact that the contractor includes the full price of the concrete block in his bid; he does not purchase the concrete block until he is awarded the contract. The amount of his markup for profit and overhead simply increases the basic damages caused by defendants' conspiracy.

The Supreme Court did not consider or discuss the economic consequences of the purchase and resale of the price-fixed product. Accordingly, *Hanover Shoe* cannot be taken as laying down an immutable rule that there is no economic connection between a contractor's material costs and his price to the owner for the materials. The Supreme Court cited a "cost-plus" contract as one example of a situation in which proof of the "passing-on defense" would be feasible. 392 U.S. at 494. The reference to this exception must be viewed in *Hanover Shoe's* factual context. The contractors here include the full cost of concrete block in their bids. This represents another pricing arrangement in which it would be not only feasible, but relatively easy, for plaintiffs to trace the illegal overcharges by defendants.[9]

[9] Several federal decisions since *Hanover Shoe* have treated the "passing-on defense" as "simply one of the

C. The issue whether the contractors passed on the illegal overcharges to plaintiffs is properly a question of fact that should be resolved by the jury.

The State of Illinois has alleged that its public agencies were injured by reason of defendants' illegal price-fixing. On a motion for summary judgment, these allegations must be taken as true unless contraverted by evidence submitted under oath, and the inferences from these facts must be viewed in the light most favorable to the State of Illinois. *Poller* v. *Columbia Broadcasting Systems, Inc.*, 368 U.S. 464 (1962); *United States* v. *Diebold*, 369 U.S. 654 (1962). Under Rule 56, defendants have the burden to submit evidence which establishes that no genuine issue of material fact exists. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144 (1970); *Stubbs* v. *United States*, 428 F.2d 885 (9th Cir. 1970); 6 Moore's *Federal Practice* ¶56.22[2] at p. 1344 (2d Ed. 1976).[10] Defendants did not support their motion for summary judgment by affidavits or sworn testimony, but simply contended that this action should be dismissed because the State of Illinois was an indirect purchaser of concrete block. The failure of

[9] (Continued)
factors to be considered in determining damages in an antitrust action under the federal statutes." *Lee's Prescription Shops, Inc.* v. *Chas. Pfizer & Co.*, 1970 Trade Cas. ¶73,180 (S.D.N.Y. 1970); *Standard Industries, Inc.* v. *Mobil Oil Corp.*, 1973 Trade Cas. ¶74,404 at p. 93,847, n. 1 (10th Cir. 1972); *Henry Obron* v. *Union Camp Corp.*, 1973-1 Trade Cas. ¶74,541 (6th Cir. 1973), *aff'g*, 1972 Trade Cas. ¶73,909 (E.D. Mich. 1972)).

[10] It is certainly not the proper function of a bare summary judgment motion "to force" plaintiffs to submit evidence (P.Br. 14), especially since the District Court stayed all discovery pending resolution of defendants' motion for summary judgment (Joint App. 21).

defendants to submit any supporting affidavits or other evidence may be readily explained. Reference to the facts would belie their speculation that it would be too difficult for indirect purchasers to prove damages.

The parallel experience in *In re Master Key Antitrust Litigation*, 1973-2 Trade Cas. ¶74,680 (D.Conn. 1973), thoroughly refutes the theoretical contentions by defendants. Just as here, defendants in the *Master Key Antitrust Litigation*, manufacturers of builders hardware, asserted that the State of Illinois and other governmental plaintiffs had no standing to recover damages, because they "did not purchase the hardware directly from defendants or their distributors and would" be unable to prove their damages. *Id.*, at pp. 94,977-94,978.

The defendants in the *Master Key Antitrust Litigation* supported their motion for summary judgment with affidavits from their employees, hardware dealers and general contractors that it would be too complicated to trace the illegal overcharges to the ultimate purchasers.[11] The governmental plaintiffs responded with affidavits from several contractors showing that:

> [O]nce a bid is received from a builders' hardware distributor, that sum is included as a single line entry on the contractor's own estimates, independent

[11] Defendants in the *Master Key Antitrust Litigation* stressed that builders hardware represented less than 1% of total construction cost, just as defendants here assert that concrete block is "an insignificant part" of some building projects (P.Br. 21). But as shown by defendants' example, 0.47% of total construction cost for the Lake County Nursing Home amounted to $23,566. This is a substantial figure, especially when multiplied by a thousand or more projects on which defendants fixed the prices of concrete block at excessive levels.

of unit prices or quantity estimates, and, along with his own percentage markup, is included *in toto* in his bid on a project. The affidavit of Willard F. Mueller, a member of the Faculty of Law at the University of Wisconsin as well as Professor of Economics there, reviewed the contractors' affidavits and concluded:

> Based on the preceding, we may infer that any overcharges paid for finished hardware components by general contractors are fully reflected in their bids on buildings for the State of Illinois. Moreover, because the percentage markup applied to costs by general contractors in calculating their bids are unaffected by the price of finished hardware, the full finished hardware overcharge is passed on to the State of Illinois plus the contractor's percentage markup on the overcharge. In other words, if this percentage markup were 10 percent, for each $1 that the conspiracy increases prices to general contractors, the State of Illinois would pay an extra $1.10.
>
> Additionally, because finished hardware components are essential parts of a building and represent a relatively small part of the total cost of a building, the demand for these components is very inelastic, i.e., the volume of purchases are not affected by price. When demand is very inelastic, increases in costs due to an overcharge will be passed on in full. . . . *Id.*, at p. 94,981.

Judge Blumenfeld, therefore, concluded that there was a "genuine issue of material fact over whether contractors use something like a 'cost-plus' arrangement with respect to builders' hardware so that the governmental plaintiffs could readily prove that they, and not the contractors, have suffered the overcharges. . . ." *Id.*, at p. 94,871. The same factual dispute exists in this case; it can only

be resolved at trial, where plaintiffs would almost certainly prevail.

The *Master Key Antitrust Litigation* went to trial before a jury in Hartford, Connecticut, on September 21, 1976. Not only did the State of Illinois introduce uncontradicted testimony that overcharges were passed on by general contractors as a matter of ordinary procedure, but defendants' arguments collapsed upon cross-examination of their witnesses. Defendants called a previous affiant, Roscoe Smith, President of W.J. Megin, a construction company in Naugatuck, Connecticut, as a witness on their behalf. Mr. Smith testified, in pertinent part:

> Q. Now, in fact, if there were an overcharge on the hardware as a result of a conspiracy among the manufacturers of the hardware, wouldn't that overcharge have been borne by the owner rather than the contractor?
> A. If it were charged on the bid that we got and we used, it would be passed on to the owner, yes sir.
> Q. That is, if it was a cost to you you would pass that overcharge on to the owner?
> A. Whatever cost we had, we would pass over to the owner, yes sir.
>
> Transcript of trial proceedings in *In re Master Key Antitrust Litigation,* M.D.L. Docket No. 45 (D.Conn.), October 21, 1976, pp. 2782-2783.[12]

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[12] Mr. Smith corroborated the testimony given by contractors on behalf of the governmental plaintiffs. For instance, Douglas Madsen, President of Orville E. Madsen & Son, a general contractor located in Madison, Wisconsin, testified:

> Q. Now, if a hardware dealer's price to you is excessive, either as a result of violation of the

The State of Illinois intends to present evidence in this case, through contractors and economists, that the full overcharge in the sale of concrete block by defendants, plus the contractor's markup, is borne by the public agencies that have constructed buildings. Defendants should meet this evidence before the jury, rather than arguing the "facts" as a basis for a legal doctrine denying standing to the State of Illinois. In this regard, defendants argue, quite irrelevantly, that most public agencies did not identify the cost of concrete block for the construction projects listed in their answers to questionnaires circulated by counsel. (P.Br. 5).[13] But the evidence necessary to identify sales of concrete block and trace overcharges in such sales may be derived from business records maintained by defendants, as well as records of contractors and architects. *Cf., State of Illinois* v. *Harper & Row Publishers, Inc.*, 301 F.Supp. 484, 491 (N.D.Ill. 1969).

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[12] (Continued)

law or for any reason, would that excessive amount of his price be passed on to the owner of the building?

A. Yes, it would.

Transcript of trial proceedings in *In re Master Key Antitrust Litigation*, M.D.L. Docket No. 45 (D.Conn.), October 8, 1976, p. 1885.

[13] These questionnaires were not intended to present plaintiffs' damage proof; they simply sought to identify public construction projects that involved the use of concrete block. They were preliminary in nature, and necessarily would be followed by normal pretrial discovery requiring defendants to set forth sales of concrete block for the construction projects involved in this litigation.

D. The experience in other cases shows that the supposed difficulties of proof are exaggerated.

There is no credible support for the blanket assertion by defendants that proof of injury by public agencies will pose insurmountable problems and unduly burden judicial resources. (P.Br. 15, 20-21). The federal courts have shown the capacity to entertain and resolve the factual issues bearing upon whether illegal overcharges were passed on to indirect purchasers.[14] For instance, in *Southern General Builders, Inc.* v. *Maule Industries, Inc.*, 1973 Trade Cas. ¶74,484 (S.D. Fla. 1972), indirect purchasers were able to prove their financial injury as a matter of fact. Following trial on the issue of liability, the jury found that defendants had conspired together to fix or stabilize the price of concrete and that the conspiracy caused damage to the plaintiffs, who had purchased buildings through contractors. Upon consideration of *Hanover Shoe,* the trial court denied defendant's motion for judgment *n.o.v.*, holding that plaintiffs had standing to recover damages even in the absence of a "cost-plus arrangement." At. p. 94,152. A petition to appeal was denied by the Fifth Circuit in *Lehigh Portland Cement Co.* v. *City of North Bay Village,* Misc. No. 2364 (April 5, 1972).

On facts close to this case, the jury found that North Dakota had suffered damages in *Armco Steel Corp.* v. *State of North Dakota,* 376 F.2d 206 (8th Cir. 1967).

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[14] It has been conceded by one prominent defense counsel that to prove overcharges were passed on "would generally be no more difficult or complex than the plaintiff's task of proving the overcharge in the first instance." Pollock, "Automatic Treble Damages and the Passing-on Defense: The *Hanover Shoe* Decision," 13 *Antitrust Bulletin* 1183, 1210 (1968).

The damage award reflected illegal overcharges paid by North Dakota on metal culverts for highways purchased through general contractors. Upon close review of the evidence, the Eighth Circuit affirmed the judgment entered on the jury verdict, holding:

> With the same price quotation for the product being made to all contractors bidding on a highway project; with this quotation being used by the contractors as their cost basis for the product in computing their project bid; . . . there could hardly be much question that such prices, in their margin of artificiality from lack of competitive play, operated directly to injure the State in increased cost of its highway projects. 376 F.2d at 210.

The Eighth Circuit concluded that the argument now advanced by defendants:

> ignores the realities, which the evidence entitled the jury to find existed, that the price quotations made by a supplier to a contractor as to a particular project constituted in the trade a commitment to the contractor to supply him with such quantity of the products as was required by the plans and specifications, upon the quoted basis, should he get the job; . . . and that it accordingly was the uniform practice of the contractors to use the list-price quotations as their cost basis for the products in making up their bids on a project. 376 F.2d at 210.

In short, proof of injury and damages by indirect purchasers has been established in jury trials without undue complexities and has resulted in substantial recoveries by public agencies.

E. The supposed "difficulties" in proving damages should not affect the standing of indirect purchasers to secure redress for their damages.

This Court's stress on problems of proof in *Hanover Shoe* reflected an underlying policy to ensure the efficacy of private antitrust enforcement. Assertion of the "passing-on defense" in *Hanover Shoe* would have created serious obstacles for the only party able to prosecute the defendant. But in this case—where the indirect purchasers have asserted claims to recover their actual damages and are in a position to prove those damages—judicial economy cannot justify the absolute denial of relief. Note, *"Mangano* and Ultimate Consumer Standing: The Misuse of the *Hanover* Doctrine," 72 *Colum. L. Rev.* at 410. In this connection, it should be noted that the states and other political subdivisions have played the leading role in private antitrust enforcement, frequently without the assistance of federal investigations. *E.g., Cast Iron Pipe Antitrust Cases,* C.A. No. 71-516 (N.D.Ala.), and *Gypsum Wallboard Litigation,* No. 46414 (N.D.Cal.).

Justice White predicted in *Hanover Shoe* that defendants would seize upon the "passing-on defense" to burden and impede the prosecution of treble-damage actions. This unwillingness to allow a defense based on inconclusive and misleading economic inquiry accords with prior federal decisions that have refused to let defendants introduce evidence of profit or loss in price-fixing cases. For instance, in *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.,* 40 F.R.D. 96 (N.D. Ill. 1966), Chief Judge Robson held that defendant's figures for "actual costs, profits or losses" were not admissible. *See also United States* v. *Alcoa,* 148 F.2d 416, 427 (2d Cir. 1945); *American Crystal Sugar Co.* v. *Mandeville*

Island Farms, 195 F.2d 622, 626 (9th Cir.), *cert. denied,* 343 U.S. 957 (1952).

Moreover, the Supreme Court has repeatedly held that the plaintiff's burden of proof should be eased rather than let a violator of the antitrust laws escape liability because it is difficult to calculate the precise amount of damages he caused. *E.g., Storey Parchment Co.* v. *Patterson Parchment Paper Co.,* 282 U.S. 555, 564 (1931). In *Bigelow* v. *RKO Radio Pictures,* 327 U.S. 251, 264-265 (1946), this Court ruled:

> But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly . . . Any other rule would enable the wrongdoer to profit by his wrongdoing at the expenses of his victim. . . .
>
> The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.

Justice White stressed in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 395 U.S. 100, 123 (1969):

> Trial and appellate courts alike must also observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff . . . ; damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts.

With regard to proof of damages in a price-fixing case, the Ninth Circuit noted that "direct proof of payment is not required" and facts raising reasonable inferences, based upon appropriate market data should suffice to go to the jury on these questions. *In re Western Liquid Asphalt Cases,* 487 F.2d at 200-201.

Defendants seek to confuse the issue of standing by complaining that proof of injury would require separate analysis of the hundreds of transactions in which the State of Illinois and its public agencies purchased price-fixed block. (P.Br. 20-21). The Second Circuit rejected the identical argument in *In re Master Key Antitrust Litigation,* 528 F.2d 5, 12, n.11 (2d Cir. 1975), with the following reasoning:

> If the appellees [the governmental plaintiffs] establish at the trial for liability that the defendants engaged in an unlawful national conspiracy which had the effect of stabilizing prices above competitive levels, and further establish that the appellees were consumers of that product, we would think that the jury could reasonably conclude that appellants' conduct caused injury to each appellee. *See In re Ampicillin Antitrust Litigation,* 55 F.R.D. 269, 275-76 (D.D.C. 1972); *Illinois* v. *Harper & Row Publishers, Inc.,* 301 F.Supp. 484 (N.D.Ill. 1969). The amount of such injury could then be computed at a separate trial for damages, and appropriate substratification of classes could be utilized to facilitate that determination.

IV. RECOVERY OF DAMAGES BY THE STATE OF ILLINOIS POSES NO THREATS OF MULTIPLE LIABILITY TO DEFENDANTS.

Defendants argue that if the State of Illinois were to recover the damages it can prove to have suffered, that would create the "serious problem of multiple recoveries." (P.Br. 17-19). The record in this case, and the experience in similar cases, show this fear to be unfounded.

This case involved suits under Rule 23 by purchasers at all levels of distribution; *i.e.,* masonry and general contractors, private builder-owners, and the public agen-

cies represented by the State of Illinois. Consequently, defendants had the opportunity to litigate the question of their liability with all potential damage claimants in one proceeding. Instead, defendants chose to settle wth the respective classes of contractors and private builder-owners, on a basis which the State of Illinois considered inadequate.[15] Thus defendants have eliminated the possibility of any subsequent suit by contractors or other intermediate purchasers. There is simply no chance in this litigation that defendants will be subjected to multiple liability.

On the other hand, intermediate purchasers frequently do not file suit. Contractors or other direct purchasers may be unwilling to antagonize important suppliers because of business relationships and possible retaliation. Moreover, the violation may be profitable to the direct buyers, who regularly mark up and pass on overcharges. It is unrealistic to expect any substantial number of direct purchasers to initiate a treble damage suit under such circumstances. Whereas public bodies can sue without fear of counterclaim or other forms of retaliation, many antitrust cases are never brought because the injured firm is acutely aware that its own business practices may not stand close scrutiny under the antitrust laws. The Ninth Circuit noted in *In re Western Liquid Asphalt* that "most of the contractors . . . have not come

[15] Upon objection by the State of Illinois, defendants stated to the District Court that the settlements "shall have no effect whatsoever on, and be without prejudice to the State of Illinois case" and that defendants would not argue that the claims of the public agencies in the State of Illinois case have been "in any way diminished" because defendants settled with contractors who purchased and resold concrete block (Joint App. 61).

forward to challenge these alleged violations" and reasoned that "it is understandable that contractors might not sue" because of their alleged dependence on defendants for asphalt and "the possibility that they earned a percentage profit on the overcharges." 487 F.2d at 198. The spectre of multiple recoveries is "nothing more than . . . a hypothetical question concerning the allocation of provable injury, not that of the standing necessary to maintain a cause of action." *State of Washington* v. *American Pipe & Construction Co.*, 274 F.Supp. 961, 965 (W.D. Wash. 1967). The possibility of subsequent suits by contractors was characterized as "largely illusory" in *In re Master Key Antitrust Litigation*, 1973-2 Trade Cas. ¶74,680 at p. 94,979. In fact, no such actions were filed.

In those situations where defendants are initially sued only by claimants at one level of distribution, the short four-year statute of limitations and procedures available in the federal courts to consolidate related lawsuits minimize the danger of inconsistent judgments or the assessment of damages against defendants more than once for the same illegal acts.

With respect to the alleged problem of double liability, *Boshes* v. *General Motors Corp.* reasoned:

> [C]utting off the rights of such a substantial number of potentially injured persons merely because such a "possibility" exists is far too drastic a measure to take. . . . [I]f the statute of limitations does not obviate the possibility of double liability, the doctrine of collateral estoppel probably would [footnote omitted]. More importantly, the procedural resources available to both the court and the parties are sufficient to avoid such an inequitable result. 59 F.R.D. at 596.

These procedures include transfer and consolidation of multidistrict cases under 28 U.S.C. §1407, as well as 28 U.S.C. §1404. Since defendants know the identity of their immediate purchasers, they can invoke statutory interpleader, 28 U.S.C. §1335, to protect themselves against being sued later by purchasers at different levels of the distribution chain.

The Ninth Circuit outlined procedures in *In re Western Liquid Asphalt* that may be used to apportion damages between "an intermediary and an ultimate consumer":

> The amount of the overcharge is not necessarily the total amount of harm to plaintiffs. Purchasers may also have been damaged by being forced to turn to substitute goods, or to discontinue purchasing the price-fixed product. The essence of conspiracy is that the conspirators believe they will recover more from the illegal overcharge than they will lose from diminished sales. . . . Thus, in passing-on cases, the intermediary should recover the amount of the overcharge that was not passed on, if the proof shows that the ultimate consumers did not pay it all, and any lost profits resulting from increased costs. The ultimate purchasers should obtain the remainder of the overcharge, and any other damages proximately caused. 487 F.2d at 200-201.

If an illegal overcharge is proved and the intermediaries were not harmed by it, then the ultimate purchasers should recover not only the overcharges by defendants, but the percentage markup put on the overcharge by intermediaries. This is simply the risk that a company takes when it violates the law.

CONCLUSION

Wherefore, the decision of the Court of Appeals should be affirmed, the case remanded to the District Court and the State of Illinois given the opportunity to prove that the impact of defendants' illegal overcharges fell upon its public agencies.

Respectfully submitted,

WILLIAM J. SCOTT
Attorney General for the State of Illinois

160 North LaSalle Street
Chicago, Illinois 60601

LEE A. FREEMAN, JR.
Special Assistant Attorney General

FREEMAN, ROTHE, FREEMAN
& SALZMAN
One IBM Plaza - Suite 3200
Chicago, Illinois 60611
(312) 467-6540